APPEAL NO. 93125

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on November 2, 1992, in (city), Texas, (hearing officer) presiding, to determine three disputed issues, namely, whether appellant (claimant) sustained an injury in the course and scope of her employment, whether she reported such injury within 30 days of the injury date, and whether she had disability resulting from such injury. The hearing officer determined that while claimant did give respondent employer (carrier) the notice required by Article 8308-5.01 (1989 Act), she did not prove by a preponderance of the evidence that she suffered a specific injury aggravation of her bilateral avascular necrosis (AVN) that arose out of and in the course and scope of her employment, and that claimant similarly failed to establish she had disability. Claimant challenges the sufficiency of the evidence to support one of the hearing officer's factual findings and three related legal conclusions. The carrier urges our affirmance.

DECISION

Finding the evidence sufficient to support the challenged finding and conclusions, we affirm.

Claimant testified that she had been employed as a school custodian for nearly 23 years. She said that on a Friday in (date of injury), while walking down a school building exterior ramp carrying a vacuum cleaner, she slipped on the wet surface and her right leg gave way. She released the vacuum cleaner, grabbed for the handrail, went down in a "split," and felt a sharp pain in her right leg. She pulled herself upright, went into the building and sat down. She said that when her supervisor, Mr B, commented on the way she was walking, she told him she slipped and he suggested she see a doctor. (No evidence from Mr. B was offered.) Claimant said she visited (Dr. R), the following Monday but does not remember the date. He later obtained an MRI of her hips and told her she had a problem with her hip. She said she was given a slip by Dr. R taking her off work for seven days and that she gave it to the school principal, Ms W the same day she saw Dr. R. Both parties introduced an off work slip from Dr. R, dated February 11, 1992, which took claimant off work for 14 days. When shown that exhibit, claimant said that was not the first off work slip, and she insisted the first such slip had taken her off work for seven days. Among Dr. R's records in evidence was a letter from Dr. R, dated January 26, 1992, stating that claimant was being treated by Dr. R for AVN in both hips and that "[s]he will need to be off work for at least 6 weeks to recuperate from this condition." This note reflected that a copy was sent to Ms. W. No other off work slip from Dr. R was introduced in evidence. Claimant indicated she has not been able to return to work since her fall, that Dr. R had not released her to return to work, and that Dr. R wanted to operate on her right hip.

Claimant stated she had previously seen Dr. R about 11 months prior to her fall for painful feet. She insisted she had had no prior problems with her hips, legs, or knees before the fall, was not hurting, and could perform her work, but that after falling and doing "the

splits" she has had pain and cannot work. Claimant's claim for workers' compensation was signed on June 10, 1992. The information on her claim form was consistent with claimant's description of her fall and stated the date of the incident as February 7, 1992. Claimant said, "[t]hat's the date I started hurting." When asked why Dr. R's records reflected her visit on January 26th and again on (office visit), claimant said she was unsure of the date of her first visit after falling, that it could have been in January, but that she was sure she fell on a Friday and saw Dr. R the following Monday. However, she also said she would defer to Dr. R's records for fixing the date of her injury since she saw him within a few days thereafter. She would also defer to Dr. R's records respecting her diagnosis. She acknowledged having seen Dr. R in March 1991 but said, repeatedly, that such earlier visit was for her feet, though at one point she appeared to waver. Claimant denied being treated by Dr. R for her hips prior to her fall and maintained she advised Dr. R of her slip on the ramp when she first saw him after the incident.

According to Dr. R's records, he first saw claimant on March 7, 1991, for complaint of pain in the back of her right thigh going down behind her knee for the past two weeks. Her hip, femur, and knee x-rays and physical exams were negative, a mild sciatica was suspected, and Dr. R started her on Naprosyn. Claimant's feet were not mentioned. In his answers to deposition questions, Dr. R stated that claimant called his office for prescription renewals in April, May, June, September, and December 1991. Dr. R also stated claimant obtained an appointment with him in January 1992 because his office would not renew her Naprosyn prescription in December 1991. Dr. R's records indicate that as of January 26, 1992, he was treating claimant for AVN, that a bone scan and MRI obtained in (date of injury) suggested AVN, that in February Dr. R referred claimant to (Dr. E) for a second opinion, and that in March he suggested a possible right hip replacement.

On March 18, 1992, Dr. R signed a statement as attending physician for claimant's claim to the Teacher Retirement System of Texas for disability retirement. (Claimant testified she did retire on disability.) According to this statement, claimant's diagnosis was bilateral AVN of the hips and the date of the onset of her disability was "approx. 2 years prior to first o.v. on 3/7/91." In his note of April 23, 1992, Dr. R stated that in his opinion claimant's AVN was "ongoing for at least a year before the diagnosis was made," and that her being on her feet and performing strenuous activities aggravated that condition. He regarded her as "permanently disabled." Asked whether claimant had told him of a slip and fall at work, Dr. R stated in his deposition that when he initially saw claimant she denied any injury. This answer was not clarified as to whether Dr. R was referring to the visit of March 7, 1991, or that of January 26, 1992; however, Dr. R went on to state he was not sure claimant ever told him about a fall. In his November 17, 1992 report, Dr. R stated he felt claimant had AVN from at least the time he first saw her even though the x-rays did not show it, and that AVN is a progressive disease. He was unsure of the etiology of the AVN, said it appeared to worsen from February (sic) 1991 to January 1992, and suspected the type of work claimant did "significantly aggravated this condition and contributed to its progression." He

also stated that the fall the claimant reported to (Dr. P), whom claimant saw upon agreement with the carrier, could have "aggravated her symptoms."

Claimant was examined by Dr. E upon referral by Dr. R. Dr. E's report of February 24, 1992, recited a history of increasing pain about the right leg for two to three years and getting worse. His diagnosis (and x-rays) confirmed bilateral AVN of the femoral heads.

On June 9, 1992, claimant was examined by Dr. P upon agreement with the carrier. The history claimant related to Dr. P regarding the slip and fall incident was consistent with her testimony and claim form, and x-rays revealed AVN in both femoral heads. Noting the absence of potential causative factors such as steroid usage, sickle cell trait, and intercurrent illness, Dr. P stated that "[a]t this time, no specific etiology can be demonstrated, but surely in this patient aseptic necrosis of the femoral head seems to be that (sic) most likely explanation." He also said: "I am not an attorney, but surely the slip may well have been that demand placed upon the hip that allowed it to begin to produce difficulty. Whether or not that is sufficient to qualify under the terms of the Workmen's Compensation Statutes I am not clear." Dr. P stated that claimant "warrants further assessment to attempt to demonstrate any of the known problems that can produce [AVN]," that such assessment had not yet been accomplished, that claimant was no candidate for returning to work at that time, and that a total right hip replacement needed to be considered.

Claimant urged in argument to the hearing officer that while certain elements of claimant's problems could have been preexisting, the slip and fall event "produced the injury and disability" and that she had a "weakened condition" and the splits "produced [her] present condition." Carrier argued that claimant had an ordinary disease of life which was not a compensable injury.

Claimant challenges the sufficiency of the evidence to support the hearing officer's factual finding that "claimant's testimony that she slipped on a wet ramp cleaning a portable school building in January or February, 1992 causing her preexisting [AVN] to become symptomatic was not found to be credible." Claimant challenges as well the three legal conclusions footed on that factual finding, namely, that claimant did not prove by a preponderance of the evidence that she suffered a specific injury aggravation of her bilateral AVN that arose out of and in the course and scope of her employment, did not establish she has disability, and that carrier is not liable for benefits.

The carrier is liable for compensation for claimant's injury without regard to her fault or negligence if the injury arose out of and in the course and scope of her employment. Article 8308-3.01(a). Claimant had the burden to prove by a preponderance of the evidence that she sustained a compensable injury and the burden was not on the carrier to prove the injury did not occur as claimant contended. Johnson v. Employers Reinsurance

Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence but also its weight and credibility. It is clear, as the hearing officer stated in the challenged finding, that the hearing officer did not find credible claimant's testimony concerning her slip and fall incident.

The Texas courts have frequently described the nature of the discretion given the fact finders in their evaluation and acceptance or rejection of evidence. In Aetna Ins. Co. v. English, 204 S.W.2d 850, 855-856 (Tex. Civ. App.-Dallas 1947, no writ), the following general rules were stated:

"Jurors may accept some parts of a witness' testimony and reject other parts, when the testimony given is inconsistent, contradictory, contrary to established physical facts, or from the manner and demeanor of the witness creating a doubt of its truthfulness, or because of the interest the witness has in the fact sought to be established or discloses a prejudice or bias on his part prompting what he has said. In such instance the jury may form its verdict upon that part accepted along with any other testimony of probative value tending to support the same fact. Notwithstanding these general rules, the jury may not arbitrarily or capriciously reject the unimpeached and uncontradicted testimony of a disinterested witness. It is the settled rule that in passing upon the credibility of a witness and the weight to be given his testimony, the jury may consider his interest, if any, in the matter sought to be established. (Citations omitted.)"

In Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.) the court instructed that the fact finders are "privileged to believe all or part or none of the testimony of any one witness . . . ." In Lopez v. Associated Employers Insurance Company, 330 S.W.2d 522, 524 (Tex. Civ. App.-San Antonio, 1960, writ ref'd), where the jury rejected the testimony of the allegedly injured employee that she had sustained an accidental injury when she slipped and fell and found instead that her incapacity was solely caused by preexisting ailments, the court said:

"It is true that [employee] testified that she slipped and fell and injured herself, but she is an interested witness and the jury was not compelled to accept her testimony as true. There is no other testimony that she fell and injured herself."

After carefully reviewing all the evidence in the record, we do not find the hearing officer's conclusion that claimant failed to prove she sustained a compensable injury in January or (date of injury) to be so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660,

662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Claimant's appeal of the adverse determination of the disability issue is moot. Since she had no compensable injury, she could not, perforce, have disability pursuant to Article 8308-1.03(16) (1989 Act).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge